Filed 2/17/05 Sagi v. Infinity Capital CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRIAN B. SAGI, Plaintiff and Appellant, v. INFINITY CAPITAL, LLC et al., Defendants and Appellants.	D041600 (Super. Ct. No. GIC765754)

APPEALS from judgments and an order of the Superior Court of San Diego County, William C. Pate, Judge. Judgments affirmed; order reversed and remanded with directions.

Plaintiff Brian B. Sagi (Sagi) filed separate notices of appeal from a judgment entered in favor of defendant Gray Cary Ware & Freindenrich, LLP (Gray Cary) and a

second judgment[1] addressing claims and cross-claims between him and defendant Yuval Boger (Boger) and two groups of venture capitalist defendants we will refer to as Concord and Infinity, respectively.[2] (We will occasionally refer to Infinity and Concord collectively as the VC defendants.) Sagi contends the court erred in granting motions for nonsuit by Gray Cary and the other defendants as to his sixth cause of action entitled "Intentional Interference With Contractual Relationship." The VC defendants appeal the portion of the second judgment awarding Sagi nominal damages of one dollar against them on his cause of action for breach of fiduciary duty, contending the court's factual findings establish as a matter of law that they have no liability on that claim. Gray Cary appeals the post-judgment order denying its motion for attorney fees. We affirm the judgments and reverse the post-judgment order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, Sagi and Boger formed Unwired to create and market a product that would enable a person to use a cell phone to connect with a remote computer. Sagi and

---

1 The judgment in favor of Gray Cary is entitled "Order and Partial Judgment in Favor of [Gray Cary]." The second judgment challenged by Infinity and Concord is entitled "Orders and Partial Judgment After Jury Verdicts and Trial by Court Re: Claims of Plaintiff Against All Defendants Except Unwired Express and Gray Cary, and Claims of Cross-Complainants Except Unwired Express."

2 The Infinity defendants are Infinity Capital, LLC; Infinity Capital Venture Fund 1999; Infinity Capital VF Affiliates 1999 (Q); Infinity Capital VF Affiliates 1999; and Infinity Capital VF 1999 Management, LLC. The Concord defendants are Concord Venture, Concord Ventures II (Israel), Concord Ventures II (Cayman), and Concord II. Because defendant Unwired Express, Inc. (Unwired) is not a party to this appeal, our references to defendants other than Gray Cary as the "other defendants" do not include Unwired.

Boger agreed that Boger would be the company's chief executive officer and would work out of Maryland, and Sagi would be president of the company and work out of San Diego. They agreed Boger would be responsible for the company's engineering and operations divisions and Sagi would be responsible for marketing, business development, and engineering support for West Coast customers.

Sagi retained Gray Cary as corporate counsel to represent Unwired and in May 2000, Unwired was incorporated under the laws of the state of Delaware. Gray Cary's retainer agreement provided that Gray Cary represented Unwired only and not any of its shareholders. As a condition of its retention as corporate counsel, Gray Cary was allowed to purchase 75,000 shares of Unwired common stock for $750.

Boger and Sagi memorialized the terms of their interests in the company in a Founder Stock Purchase Agreement and an Amended and Restated Founder Stock Purchase Agreement. These agreements provided that Sagi and Boger each would be entitled to purchase 4,000,000 shares of common stock in Unwired at $.001 per share. The stock would vest in increments over time and unvested shares would be subject to repurchase by Unwired under certain conditions, one of which was termination of Sagi's or Boger's employment for cause. Certificates for the unvested shares were delivered to Gray Cary under Joint Escrow Instructions that were attached to the Founder Stock Purchase Agreements and authorized Gray Cary to act as escrow agent.

Sagi and Boger solicited venture capitalists and other investors to provide capital for Unwired. Infinity and Concord each invested $3.5 million in Unwired by purchasing 4,000,000 shares of the company's Series A preferred stock. As a condition to their investment, Sagi agreed to step down as president of the company and assume the role of vice-president of business development.

An investment partnership comprised of Gray Cary attorneys and known as GCWF Investment Partners II purchased 28,751 shares of Series A stock. In connection with the Series A transaction, Sagi and Boger as founders and the Series A investors signed an "Investors' Rights Agreement" that governed various matters, including the election of company directors. After the Series A transaction closed in August 2000, the four members of Unwired's board of directors were Sagi, Boger, Infinity representative Virginia Turezyn, and Concord representative Yair Safri. The capital structure of Unwired was approximately as follows: Sagi and Boger each owned 23.41 percent of the company; Infinity and Concord each owned 23.42 percent of the company; Gray Cary owned .6 percent of the company; and the remaining stock was either owned by employees or consultants or was in the employee stock option pool.

In the few months after the Series A transaction closed, Sagi's relationship with Boger deteriorated as they became embroiled in disputes over management issues. Boger concluded he could not work with Sagi and make the company successful. Shortly before a meeting of the board of directors on October 26, 2000, Boger told Sagi that the other directors wanted him to leave the company. Sagi told Boger and the other two board members that he intended to resign. However, on October 30, Sagi sent Boger a

letter stating he had decided not to resign and believed it would be in the best interests of Unwired for them to work out their differences over his role at the company. On November 1, Boger told Sagi in a letter that he (Sagi) had misunderstood "the decision that was made at last Thursday's board meeting in which the Company determined that it would be necessary to end its employment relationship with you[,]" and that "your decision to retract your resignation does not change the fact that the Company had a [*sic*] made a decision to terminate your employment for cause based on ongoing concerns about your job performance." Later that month, Sagi was removed as a director and from the position of corporate secretary of Unwired by written consents of the shareholders, including Gray Cary.

At the time of Sagi's termination, 1,629,333 of his 4,000,000 shares of Unwired's common stock were vested and the other 2,370, 667 shares were unvested. In December 2000, Unwired informed Sagi by letter that it was exercising its rights under the Founder Stock Purchase Agreement to repurchase his unvested shares on the ground his termination was for cause. Unwired enclosed a check in the amount of $2,370.67 for the repurchase and a stock certificate reflecting Sagi's ownership of 1,629,333 vested shares. Gray Cary canceled the 4,000,000 share certificate it had been holding for Sagi as escrow agent.

Sagi disputed Unwired's right to repurchase his unvested shares. After he communicated his position to Gray Cary, Gray Cary issued a share certificate for his 2,370, 667 unvested shares and held the certificate in escrow pending resolution of the dispute, as it was required to do under the Joint Escrow Instructions. Although that share

certificate was dated December 27, 2000 – the date Unwired elected to repurchase Sagi's unvested shares – Gray Cary did not actually prepare the certificate until March 2001.

Sagi filed the instant action against Gray Cary and the other defendants in April 2001. At that time, Unwired was seeking additional financing without success. By September 2001, Unwired was running out of money with no reasonable prospects of securing outside investors. Consequently, the VC defendants were faced with the choice of either shutting down the business or investing more money through the purchase of Series B preferred stock. The VC defendants decided to invest another $6 million on the condition they would own 80 percent of the company and any of the current shareholders would have to invest proportionately to prevent their interest in the company from being diluted. The $6 million was to be paid in quarterly installments that would be conditioned on Unwired meeting certain predetermined goals. To accomplish their desired 80 percent ownership of Unwired, the VC defendants required retroactive application of a "full ratchet,"[3] which resulted in their acquisition of about 122 million additional shares of common stock through the Series B transaction.

---

3 "Ratchet" protection is a form of dilution protection that gives an investor the benefit of lower-priced stock issuances during the term of the ratchet. "For example, if a Series B financing of the company occurred at $.75 per share [after Series A financing at $1.25 per share], the Series A investors would be able to convert their preferred stock into common stock as if they had purchased it at $.75 pre share rather than $1.25 per share. Thus, instead of owning 2,000,000 million shares, they would own 3,333,333 shares." (Lister & Harnish, Directory of Venture Capital (John Wiley & Sons, 2d ed. 2000) p. 14.)

As a result of the Series B transaction, Sagi's ownership interest in Unwired was reduced to about one percent and the per-share value of the company's common stock dropped to five and a half cents. The VC defendants made their installment payments until the end of the third quarter of 2002, at which time they took the position that Unwired had failed to meet its objectives for that quarter. During the trial of this action, Unwired discharged its employees, began shutting down the business due to insufficient funds, and was placed in involuntary bankruptcy in federal court in Maryland.

Sagi filed a first amended complaint containing causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, "breach of implied in fact contract of employment" and "common count" (reasonable value of work, labor and materials) against Unwired;[4] breach of fiduciary duty, intentional interference with economic relationship, negligent interference with economic relationship, and constructive fraud against all defendants except Unwired; constructive trust/unjust enrichment against all defendants; defamation against all defendants except Gray Cary; and conversion (of 4,000,000 million shares of common stock) against all defendants.

---

4 Sagi's two contract causes of action are each divided into "Count One" and "Count Two." The title of each of those causes of action states the cause of action is against Unwired and the allegations of Count One of each cause of action are against Unwired. However, Count Two of each cause of action alleges that "defendants" breached an "AMENDED CERTIFICATE of UNWIRED EXPRESS" and the "INVESTORS' RIGHTS AGREEMENT." The first amended complaint also includes a third cause of action for tortious breach of the implied covenant of good faith and fair dealing against all defendants, but states: "THE ALLEGATIONS OF THIS CAUSE OF ACTION ARE CARRIED FORWARD IN THIS AMENDMENT FOR REFERENCE PURPOSES, RECOGNIZING THIS COURT HAS GRANTED DEFENDANTS' DEMURRER WITH RESPECT TO THIS CAUSE OF ACTION."

After Sagi presented his evidence at trial, all of the defendants orally moved for nonsuit under Code of Civil Procedure section 581, subdivision (d) on the claims to be presented to the jury, and for judgment under section 631.8 on the claims to be decided by the court.[5] The court granted Gray Cary' motions. As to the other defendants, the court granted nonsuit or judgment on all of Sagi's claims except count one of the first cause of action for breach of contract against Unwired, the fifth cause of action for breach of fiduciary duty and ninth cause of action for constructive fraud against all defendants except Unwired, and the eighth cause of action for constructive trust/unjust enrichment against all defendants.

A jury returned a verdict in Sagi's favor on count one of the first cause of action, awarding him damages of $2.15 million against Unwired for the unauthorized repurchase of his unvested common stock based on the finding that his termination was not for cause. The court found that the VC defendants breached fiduciary duties owed to Sagi in connection with the Series B transaction, but that Sagi was not monetarily damaged by

---

5 The non-Gray Cary defendants initially moved for nonsuit only. However, after Gray Cary's counsel moved for both nonsuit and judgment, counsel for the other defendants also moved for judgment under section 631.8, stating: "[Gray Cary's counsel] reminded me that your honor had already made a decision to decide certain claims and be the trier of fact on those[,] so based upon all the things I said before, we're also moving for . . . judgment as well as nonsuit."

the breach. Accordingly, the court awarded Sagi nominal damages of one dollar against the VC defendants on his breach of fiduciary duty claim.[6]

Gray Cary filed a post-judgment motion for attorney fees based on a clause in the Investors' Rights Agreement that provides for the recovery of attorney fees and costs by the prevailing party in any action "arising out of " or "concerning" that agreement or any "transaction contemplated" under the agreement. The court denied the motion on the grounds Gray Cary was not a party to the agreement and none of Sagi's causes of action against Gray Cary arose out of or concerned the agreement.

DISCUSSION

I. Sagi's Appeal

Sagi appeals the court's granting of two separate motions for nonsuit as to his sixth cause of action for intentional interference with economic relations—one by Gray Cary and the other by Boger and the VC defendants. We note Sagi's pleading is ambiguous as to whether the sixth cause of action is for intentional interference with contract or the distinct tort of intentional interference with prospective economic advantage, and he does not firmly commit to one theory over the other in his opening brief. Gray Cary addresses both theories in its responding brief. The other defendants have mainly viewed the cause of action as one for intentional interference with prospective economic advantage and contended, as the basis for their nonsuit motion and on appeal, that the "independent wrongfulness" element applicable to that tort is missing.

---

6 The judgment also addresses various cross-claims against Sagi, which we do not

Although at trial, Sagi made statements indicating he intended the sixth cause of action to cover both theories, in his reply brief addressed to Boger and the VC defendants Sagi asserts that his claim is for intentional interference with contract.[7] We agree with that assertion and view the sixth cause of action strictly as one for intentional interference with contract, as it is the disruption of Sagi's contractual relationships with Unwired that are at issue here. When a third party interferes with the future benefits that a party to a contract expects to receive under the contract, the applicable tort is interference with contractual relations and not intentional interference with prospective economic advantage, as the latter tort applies only to economic relationships that have not ripened into contractual relationships. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392.)

The Court's Articulated Grounds For Granting Nonsuit

The parties and the trial court did not address the following rule that applies to nonsuit motions: In deciding a motion for nonsuit, the trial court should consider only the grounds specified by the moving party in support of the motion. (*John Norton Farms v. Todagco* (1981) 124 Cal.App.3d 149, 161.) It is improper to grant a nonsuit on some other ground that was not brought to the plaintiff's attention and, therefore, plaintiff had no opportunity to eliminate. (*John Norton Farms v. Todagco, supra,* 124 Cal.App.3d at

---

address because they are not at issue in this appeal.

[7] In response to the argument that the "independent wrongfulness" element is missing, Sagi argues that the element does not apply to his action because defendants interfered with his Founder Stock Purchase Agreement.

p. 161; *Castaneda v. Bornstein* (1995) 36 Cal.App.4th 1818, 1824, fn. 4 [court erred in granting nonsuit based on insufficiency of evidence where defendant did not raise that ground in written motion or in oral argument on the motion], disapproved on another point in *Bonds v. Roy* (1999) 20 Cal.4th 140, 149, fn. 4.) Similarly, "[o]nly the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.) "[O]rdinarily the reviewing court will uphold the judgment or order of the trial court if it is right, although the reasons relied upon or assigned by the court are wrong. The doctrine is sound and salutary in most situations since it prevents a reversal on technical grounds where the cause was correctly decided on the merits. But this is not true as applied to nonsuits, for such a doctrine would frequently undermine the requirement that a party specify the ground upon which his motion for nonsuit is based in order to afford the opposing party an opportunity to remedy defects in proof. It seems obvious that the doctrine intended solely to uphold judgments correct on the merits should not be permitted to produce the opposite result. The correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion. This rule is complementary to the requirement that a party specify the grounds upon which his motion for nonsuit is based." (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 93-94.)

Gray Cary moved for nonsuit as to the sixth cause of action on two grounds: (1) Gray Cary did nothing to interfere with Sagi's Founder Stock Purchase Agreement other

than doing what it was required to do under the escrow agreement, and (2) there is no evidence it conspired with anybody regarding Sagi's Unwired stock. The other defendants moved for nonsuit as to the sixth cause of action on the sole ground that Sagi had not "presented any evidence of any independent wrongful act . . . that would go beyond the interference itself, that would go beyond the alleged breach of the contract itself."

In its initial ruling from the bench, the court articulated its own independent ground for granting the motions, stating: "Oh, it's pretty simple. I don't think you can have interference with a contract by parties that are inextricably intertwined with the signatory of the contract. . . . It has to be third parties. They're not third parties." Agreeing with the proposition that "the law is that a shareholder cannot interfere with a contract between a corporation and another shareholder[,]" the court added: "They can interfere through breach of fiduciary duty which gives you the same remedies, but this theory is designed for independent third parties to come in and interfere with contracts; in other words, you can't sue somebody for interference with a contract who's a party to the contract." The court later summarized: "I don't think you can really interfere with an economic relationship when you're part of the party who's got the contractual relationship . . . ."

A few days later, after Sagi's counsel had provided the court with points and authorities on this issue and asked it to reconsider its ruling, the court expressed its view that because none of the defendants were "strangers to the contract," and each had "a legitimate interest in the scope and performance of the contract," they enjoyed "the

immunity of agents." The court also found defendants "had no tortious conduct from which liability could flow." In the course of ensuing oral argument, the court stated: "[T]here's no evidence the shareholders did anything outside the bounds of being shareholders in the case. . . . [¶] . . . [¶] . . . Here all the liability is derivative from the position these people held either as shareholders or members of the board of directors."

Addressing Gray Cary's liability, the court added that it "didn't see any evidence that Gray Cary did anything that induced a breach of this contract other than they prepared the documents, as lawyers, and that's privileged . . . ." In a later-filed written statement of decision, under the heading "Intentional Interference With Prospective Economic Advantage", the court stated: "Gray Cary's motion for nonsuit was granted as to this claim because Gray Cary, exercising its rights as a shareholder, could not legally interfere with the contracts of Unwired Express. Even if Gray Cary took the actions alleged in the complaint and urged at trial, Gray Cary's actions would not constitute interference with a contract. None of the alleged conduct rose to the level of a tort independent of the interference itself. Further, Gray Cary was not an independent third-party to the contract, but rather was a very interested party in a contract that directly affected its interest in Unwired Express."

The court's various explanations of its reasoning boil down to two distinct grounds for granting nonsuit on the sixth cause of action for contract interference as to both Gray Cary and the other defendants: (1) as a shareholders of Unwired having an interest in the company and exercising their rights as shareholders, defendants were not third-parties to Unwired's contracts with Sagi and thus could not be liable for interfering with them; and

(2) in any event, none of defendants' actions alleged by Sagi to be contract interference amounted to tortious interference. In granting nonsuit on the first ground, the court essentially was applying the "financial interest" or "owner's" or "manager's" privilege articulated in Restatement of Torts section 769 (section 769 privilege) – a privilege recognized by California law, as we discuss below. The second ground was more or less the ground asserted by Gray Cary and the other defendants in moving for nonsuit on the sixth cause of action – i.e., there was no *tortious* contract interference. The court effectively articulated this ground as to *all* defendants when it stated from the bench that "the parties [i.e., defendants] were not strangers to the contract, and they had no tortious conduct from which liability could flow." However, it is clear from the record that the court mainly based its grant of nonsuit on the section 769 or financial interest privilege.

We may properly consider the section 769 privilege as a basis for affirming the grants of nonsuit despite defendants' failure to specify that ground in moving for nonsuit because Sagi did not object below to the court's granting nonsuit on a ground not specified by the parties, and he has not raised the issue on appeal. An appellant waives his right to attack error by expressly or impliedly agreeing or acquiescing at trial to the ruling or procedure in question. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) Similarly, issues not raised in an appellant's brief are deemed waived or abandoned. (*Tan* v. *California Fed. Sa*v. *& Loan Assn*. (1983) 140 Cal.App.3d 800, 811.)

Sagi has waived the *procedural* issue of whether the section 769 privilege was a proper ground for granting defendants' nonsuit motions by challenging that ground solely on the merits. Additionally, our consideration of the section 769 privilege as a ground for

nonsuit is proper because the bar of the privilege was a defect in Sagi's contract interference claim that could not have been remedied had it been called to his attention by the motions for nonsuit. (*Lawless v. Calaway, supra,* 24 Cal.2d at p. 94.)

The Court Did Not Err In Granting Nonsuit Based On A Defense

In reply to Boger and the VC defendants' respondents' brief, Sagi asserts: "[N]egation of any applicable privilege is not an element of Plaintiff's *prima facie* case, and need not be **dis**proven by Plaintiff. Rather, assertion of an applicable privilege is an affirmative defense, and [defendants] have the burden of proof on this issue." (Reply, p. 5.) However, nonsuit may be granted on the basis of an affirmative defense when the plaintiff's evidence conclusively establishes the defense as a matter of law. (*Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1041 [Nonsuit on opening statement "can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense."]; *Sperling v. Hatch* (1970) 10 Cal.App.3d 54, 57, 61-62 [nonsuit based on defense of assumption of risk was proper as to plaintiff whose own testimony established the defense applied as a matter of law]; *Eulenberg v. Torley's, Inc.* (1943) 56 Cal.App.2d 653, 656-657 [subsequent action barred by nonsuit on the ground the evidence affirmatively establishes plaintiff is not entitled to recover as a matter of law]; *Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 642 [trial court properly granted nonsuit in contract action when evidence discloses illegality of contract even when the defendant did not

assert the illegality as an affirmative defense in the pleadings].) As we discuss below, the court properly based nonsuit as to the sixth cause of action on the "financial interest" or section 769 privilege because the evidence established that defense as a matter of law.

Defendants are Immune Under The Financial Interest Privilege From Liability For Interference With Sagi's Contractual Relationship With Unwired

Section 769 of the Restatement of Torts provides that "'[o]ne who has a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor [¶] (a) does not employ improper means, and [¶] (b) acts to protect his interest from being prejudiced by the relation.' Clarifying the meaning of this section, comment a emphasizes that the financial interest privilege under section 769 is an interest in the nature of an investment (i.e., interest of a part owner, partner, *stockholder* and the like)[8]. . . .[T]he case law underlines that the privilege that arises by reason of section 769 is . . . a qualified privilege which depends for its existence upon the circumstances of the case." (*Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 21-22, italics added; *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593, 599.)[9]

---

8 Comment (a) to section 769 states: "The financial interest in another's business requisite for the privilege stated in this Section is an interest in the nature of an investment. A part owner of the business, as for example, a partner or stockholder, has at least such an interest."

9 Section 769 of the Second Restatement of Torts similarly provides: "One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he [¶] (a) does not employ wrongful means and [¶]

Whether this privilege protects a person having a financial interest in an entity's contracts from liability for interfering with those contracts depends on whether the person was acting to protect the entity's interests. (*Wanland v. Los Gatos Lodge, Inc*. (1991) 230 Cal.App.3d 1507, 1522 (*Wanland*).) *Wanland* stated: "Thus, the owner of an entity enjoys a qualified privilege to terminate a contract to which the entity is a party, provided that the owner's predominate purpose in inducing the breach is to further the entity's interests. [Citation.] And a manager likewise enjoys a qualified privilege to induce the entity to breach a contract that he or she reasonably believes to be harmful to the entity's best interests. [Citation.] A manager need not be acting solely in his or her employer's interests in order to claim the privilege; *all that is required is proof that the employer's interest was one of the factors motivating his or her conduct or advice*." (*Ibid.*, italics added.)[10]

The quoted language from *Wanland* refers to two different standards for applying the section 769 privilege: the "predominant purpose" standard applicable to *owners* and the "mixed motive" standard applicable to *managers*. *Wanland* does not explain the rationale for applying a stricter standard to owners than to managers in determining

---

(b) acts to protect his interest from being prejudiced by the relation." Comment c to this section states, in part: "The financial interest in another's business requisite for the rule stated in this Section is an interest in the nature of an investment. A part owner of the business, as for example, a partner or stockholder, has at least an interest of this nature."

10 The California Supreme Court expressed a similar principle in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514, stating: "The tort duty not to interfere with performance of [a] contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance."

whether the qualified privilege applies. *Wanland* cites *Shapoff v. Scull* (1990) 222 Cal.App.3d 1457, 1468 — 1469 as authority for application of the "predominant purpose" standard to owners and the "mixed motive" standard to managers. (*Wanland, supra,* 230 Cal.App.3d at p. 1522.) *Shapoff* cites *Los Angeles Airways, Inc. v. Davis* (9th Cir. 1982) 687 F.2d 321, 327 as authority for applying the mixed-motive test to managers and *Culcal Stylco, Inc. v. Vornado, Inc.* (1972) 26 Cal.App.3d 879, 883 as authority for applying the "predominant purpose" test to owners. (*Shapoff, supra,* 222 Cal.App.3d at pp. 1468-1469.) *Culcal* did not discuss application of the section 769 privilege to "managers" as opposed to "owners." Citing Prosser on Torts, *Culcal* merely concluded that whether the section 769 privilege applied to a parent corporation charged with inducing the breach of a contract to which its subsidiary was a party depended on the parent's "predominant purpose in inducing the breach of the contract."

We question whether there is a rational basis for applying a stricter section 769 privilege standard to owners than to managers. Courts in some other jurisdictions do not engage in "predominant purpose" versus "mixed motive" analysis, but rather simply hold that the qualified manager's or agent's privilege to interfere with the corporation's business relationships applies as long as the agent or corporate fiduciary acts in good faith to protect the interests of the corporation. (See e.g., *Hsu v. Vet-A-Mix, Inc.* (Iowa 1991) 479 N.W.2d 336, 339; *Wilson v. McClenny* (N.C. 1964) 136 S.E.2d 569, 578.) Arguably, deciding whether a defendant asserting the section 769 privilege acted in good

faith to protect the corporation's interest is a more meaningful and workable standard for a trier of fact than having to decide whether protecting the corporation's interest was the defendant's *predominant* purpose, as opposed to merely being a non-predominant motivating factor.[11]

Here, the court concluded the defendants enjoyed the "immunity of agents" because they had an interest in Unwired as shareholders of the company, but the court did not indicate whether it regarded that immunity as absolute or qualified, or whether it was applying a "predominant purpose" or "mixed motive" test. However, we need not decide which of those tests or formulations of the section 769 privilege generally applies to a non-owner or non-manager shareholder charged with interfering with a contract of the corporation, as we conclude Sagi's evidence is insufficient to negate the section 769 privilege as to any defendant under either test.

The section 769 privilege protects defendants from liability for any conduct that was largely motivated by a good faith desire to further Unwired's interest, as opposed to being motivated primarily by an intent to interfere with Sagi's contractual relationship with Unwired. Thus, to reverse the nonsuit as to any defendant we would have to be able

---

11 In *Huynh v. Vu* (2003) 111 Cal.App.4th 1183, the Court of Appeal set forth an extensive analysis of the scope of the "manager's privilege" as developed under California case law, noting that three formulations of the privilege have emerged: (1) absolute, (2) mixed motive, and (3) predominant purpose. *Huynh* concluded that "when a manager stood to reap a tangible personal benefit from the principal's breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager's privilege unless the trier of fact concludes that the manager's *predominant* motive was to benefit the principal. (*Huynh v. Vu, supra,* 111 Cal.App.4th at p. 1198.)

to point to evidence raising a reasonable inference that the defendant's alleged contract interference was not principally motivated by a desire to further or protect Unwired's interests. We cannot weigh the evidence, but must determine if any of it raises a reasonable inference that any defendant committed an actionable act of interference with Sagi's contractual relationships with Unwired that is not protected by the section 769 privilege – i.e., was not largely motivated by a desire to further Unwired's interests. In making that determination, we will restrict our review to the evidence cited by Sagi in his brief as making his prima facie case of actionable interference. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11. [it is not the appellate court's responsibility to develop an appellant's argument].)

Evidence concerning Gray Cary

Preliminarily, we address Gray Cary's contention that the court's findings on its motion for judgment are dispositive of the sixth cause of action for interference with economic relationship because Sagi does not challenge them on appeal. These findings are set forth in the court's "Tentative Statement of Decision Re Defendant Gray, Cary, Ware and Friedenrich, LLP." Because none of the parties objected to and the court did not amend this "Tentative Statement of Decision" before entry of judgment, we view it as a final statement of decision containing the operative findings on Gray Cary's motion for judgment. (See *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1379-1380; *Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135,

---

Huynh did not discuss an "owner's privilege" separate from the "manager's privilege."

141 [court retains the power to change its findings of fact or conclusions of law *until judgment is entered*].)

Gray Cary correctly asserts that the court's factual findings on the motion for judgment on Sagi's equitable cause of action for breach of fiduciary duty are binding in any later phase of the trial. "Issues adjudicated in earlier phases of a bifurcated trial are binding in later phases of that trial and need not be relitigated." (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487.) "Where a case involves both equitable and legal causes of action, the trial court may bifurcate the case to try the equitable issues first, because resolution of the equitable issues may eliminate the need for a trial of the legal causes of action." (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50.) When the court properly tries equitable issues and resolution of such issues leaves nothing remaining to be tried by jury, the court has authority to treat the jury's verdict and findings as advisory only. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665 ,670.)

Accordingly, if the court's findings on the motion for judgment are dispositive of the sixth cause of action as to Gray Cary, it would be a pointless exercise to reverse the nonsuit on that cause of action, because the effect of the reversal would be to allow Sagi to try that cause of action to a jury that would be bound by the court's findings on the motion for judgment. To the extent those findings establish either that Gray Cary committed no acts of interference with Sagi's contractual or prospective economic relationship with Unwired or that any such acts were protected by the section 769

privilege, there would be nothing for the jury to decide and nonsuit or directed verdict in Gray Cary's favor on the sixth cause of action would be proper.

Regardless of whether the court's findings on Gray Cary's motion for judgment conclusively defeat the sixth cause of action as to Gray Cary, a number of them establish that certain acts by Gray Cary cited by Sagi as supporting his prima facie case of contract interference either fall within the section 769 privilege or did not interfere or evidence a conspiracy to interfere with Sagi's contractual relationship with Unwired.

In his opening brief, Sagi cites the following facts and evidence as establishing a prima facie case of contract interference by Gray Cary:[12]

1. *Under the stock purchase agreement (Ex. 5), Gray Cary would forfeit a substantial potion of its 75,000 shares of common stock if its service to Unwired was interrupted for any reason. Sagi asserts it was in Gray Cary's pecuniary interest to ensure that its service to the company continued uninterrupted*.

The fact that Gray Cary's uninterrupted service to the company yielded a financial benefit to Gray Cary has no bearing on whether Gray Cary intentionally interfered with Sagi's contractual relationship(s) with the company.

2. *"In preparation of what was to come," on August 16, 2000, Gray Cary prepared a written consent of stockholders to unilaterally remove Sagi from the board of*

---

12 In the "prima facie" case section of Sagi's opening brief, Sagi frequently refers to "defendants" having committed various acts without differentiating between Gray Cary and the other defendants. Many of the references to "defendants" obviously do not include Gray Cary. Our discussion of Sagi's prima facie case against Gray Cary is

directors on "November __, 2000" and a written consent of the board of directors to unilaterally remove Sagi as an officer on "November __, 2000." Although the written consent to remove Sagi from the board has a typewritten date of November 21, 2000, that written consent and the one to remove Sagi as an officer were actually prepared by Gray Cary in August 2000, before the closing of the Series A preferred stock. As evidence of the earlier preparation, Sagi cites Gray Cary's word processing list, which shows that documents bearing the document numbers on the consent forms were prepared on August 16, 2000.

Sagi's claim that Gray Cary prepared the consent forms in August is negated by the following express findings made by the court in ruling on Gray Cary's motion for judgment: "The consents removing [Sagi] as a director and as secretary of the company were not prepared in August 2000. The court finds credible and accepts the testimony of Gray Cary associate Christian Waage that the word processing 'footer' indicating an August date was carried over from another document used as a form for the consents. The Court believes Waage's testimony that the two consents were prepared around the time they were executed, in November, 2000." These findings eliminate Sagi's evidence that Gray Cary prepared the consents in August as a basis to reverse the nonsuit as to Gray Cary.

---

limited to Sagi's express references to Gray Cary in his prima facie argument. We set forth Sagi's assertions in italics to set them apart from our analysis.

3. *In a transaction that closed on August 21, 2000, two Gray Cary attorneys and an investment fund comprised of Gray Cary attorneys together acquired 39,427 shares of Series A preferred stock.*

This fact tends neither to prove nor disprove Sagi's interference allegations against Gray Cary.

4. *The termination of Sagi's employment, which occurred on October 26, 2000, did not become a termination for cause until after the termination and until defendants had spoken with Gray Cary and reviewed the terms of the Founder Stock Purchase Agreement.*

To the extent Sagi claims Gray Cary interfered with his employment contract by participating in the decision to deem his termination as being for cause, the claim is negated by the court's express finding on Gray Cary's motion for judgment that "Gray Cary did not conspire or act to characterize Sagi's termination of employment as being for cause." The court also found: "Gray Cary played no role in the termination of Sagi's employment other than as corporate counsel. There was no credible evidence that Gray Cary was even aware that Sagi's employment was to be terminated until after he had already been notified of the pending termination."

5. *Gray Cary chose not to abstain from the vote to remove Sagi from the board of directors but rather by written consent voted its 75,000 shares of common stock to remove him from the board. In doing so, Gray Cary was acting as a shareholder to assist the other defendants in Sagi's removal from the company. Gray Cary's vote was*

the swing vote, without which there would not have been a majority vote of the shareholders to remove Sagi.

Paul Kreutz, one of the Gray Cary attorneys handling Unwired's account, testified that Gray Cary was following its normal practice (when it holds a small stock interest in a company) of voting its shares in accordance with management's recommendations because it presumes management's recommendations are in the company's interests. Kreutz also testified that he viewed allowing Sagi to remain on the board as not being in the company's best interests because Sagi was no longer part of the management team or active in the business of the company, and he had an adversarial relationship with the company. Sagi cites no evidence that would support a reasonable inference to the contrary – i.e., that protecting or furthering the company's best interests was not the motivation for Gray Cary's decision to vote for Sagi's removal. The undisputed fact that Gray Cary voted its shares to remove Sagi from the board is not a basis to reverse nonsuit in Gray Cary's favor because uncontroverted evidence establishes that Gray Cary was acting to protect or further the company's interests and thus was protected by the section 769 privilege.

6. *Gray Cary tabulated the shareholder votes to remove Sagi from the board of directors. The share register maintained by Gray Cary shows the tabulation of the votes was "insufficient." "Defendants" refused to provide the details of how they calculated a majority vote because "they knew there had not been a majority of shares voting, and did not want to reveal this to [Sagi]*."

In its statement of decision regarding Gray Cary's motion for judgment, the court stated: "It appears that the consent of a majority of shares to remove Sagi, was not obtained. Even if the consents were insufficient, that would be the responsibility of Unwired Express, and not Gray Cary, one of the consenting shareholders. Even though Gray Cary, as corporate counsel, may have been charged with calculating the number of voting shares outstanding, any error or failure in accuracy, does not constitute a breach of fiduciary duty as a shareholder of Unwired Express. There was no proof at trial that Gray Cary intentionally manipulated the vote court to remove Sagi." This finding negates Gray Cary's vote tabulation as a basis for finding it intentionally interfered with Sagi's economic relationship with Unwired.

7. *After "defendants" caused Unwired to repurchase 2,370,667 of Sagi's common stock at $.01 per share, Gray Cary, as escrow holder, physically canceled the share certificate it held for Sagi's 4,000,000 shares and prepared a new certificate for 1,629,333 shares. Sagi contends that in response to an inquiry by his counsel, Gray Cary falsely represented that it held a stock certificate in Sagi's name for the 2,370,667 shares claimed by Unwired to be unvested and thus in dispute. Sagi claims that, in fact, Gray Cary had wrongfully canceled those shares and then created a back-dated certificate for them. Sagi claims that when he asked to see his personnel file, "defendants" stonewalled while they created an after-the-fact assemblage of documents for the personnel file and decided what portions Sagi should be allowed to see.*

Addressing this matter in granting Gray Cary motion for judgment as to Sagi's cause of action for breach of fiduciary duty, the court found:

> "Gray Cary's conduct with respect to plaintiffs' shares in escrow was in conformance with the Joint Escrow Instructions. Gray Cary was authorized by Unwired Express and Sagi to hold his shares in Unwired Express until such time as the company informed Gray Cary it was electing to repurchase any 'unvested' shares. At that time, Gray Cary cancelled the original stock certificate and prepared a new stock certificate for Sagi's 'unvested' shares. Gray Cary delivered the new share certificate to Sagi, along with a check for the repurchase of the 'unvested' shares. When Gray Cary was advised that Sagi disputed Unwired Express' right to repurchase his shares, Gray Cary placed the 'unvested' shares back into escrow pursuant to paragraph 14 of the Joint Escrow Instructions. Gray Cary promptly notified Sagi of this action.
>
> "The new share certificate was not prepared until March, 2001, three months after Gray Cary advised Sagi in writing that it was holding the disputed shares. This delay in preparing the new share certificate does not constitute a breach of Gray Cary's fiduciary duty as escrow holder. The certificate itself is merely evidence of the shares; it is not the shares." (Citing *Baker v. Banker's Mortgage Co*. (Del. 1926) 135 A. 486, 488.)

The court's finding that Gray Cary's delay in preparing the new certificate was not a breach of fiduciary duty precludes a finding that the delay evidences intentional interference with Sagi's contractual relationship with Unwired.

The court also found that "Gray Cary did not participate in the creation of a false personnel file[,]" and" Gray Cary was not part of a conspiracy to wrongfully take back shares of Sagi's founders stock. Any discussions with Gray Cary regarding the right to repurchase his stock were in the nature of attorney-client communications." These unchallenged findings establish that the evidence of Gray Cary's role as escrow holder in Unwired's repurchase of Sagi's common stock is insufficient to support liability for intentional interference with Sagi's contractual relationships with Unwired.

As Gray Cary points out on pages 37-39 of its responsive brief, none of the other evidence cited by Sagi as constituting his prima facie case of contract interference

concerns Gray Cary. The evidence cited by Sagi that *does* concern Gray Cary does not support a reversal of the nonsuit on the sixth cause of action as to Gray Cary.

Evidence concerning Infinity, Concord and Boger

In his opening brief, Sagi sets forth the following factual assertions and supporting evidence that he claims establish a prima facie case of interference by Infinity, Concord, and/or Boger with his contractual and economic relations with Unwired.

1. *Citing Exhibit 311, Sagi claims that before even investing in Unwired, Infinity and Concord believed Sagi's percentage of ownership in the company (4,000,000 shares) was too high.*

Exhibit 311 is an internal email from an Infinity representative stating: "The problem to me is that the founders % is too high (in their mind – to get to a pre-money valuation over $10MM). To get to a 40/40/20 split, pre-money valuation obviously drops." Sagi also cites to his own testimony that Boger told him that Infinity would not invest unless he (Sagi) stepped down as president of Unwired and that Infinity wanted him to give up some of his stock if he was not president.

Exhibit 311 merely shows that in considering whether to invest in Unwired, Infinity was concerned about the mathematical relationship between the ownership percentages the founders wanted after the VC defendants' invested in the company and the company's pre-money valuation. Pre-money valuation is the value of a company before a particular round of investment, and it determines the percentage of ownership a particular investment amount will yield. (E.g., if a company's pre-money valuation is $5 million, a $5 million investment would give the investor 50% ownership, $5 million

being half of the company's post-money valuation of $10 million.) A higher pre-money valuation obviously results in a lower percentage of ownership for the amount invested.

The author of the email apparently did not believe Unwired's pre-money valuation could be $10 million if the resulting ownership percentages were to be as set forth in the attached spreadsheet presumably prepared by the founders. Evidence of Infinity's legitimate business concern over pre-money valuation in deciding whether to invest millions of dollars in Unwired does not raise a reasonable inference that before investing, Infinity intended to interfere with Sagi's contractual relationship with the company by wrongfully depriving him of stock ownership. The email simply expresses the view that the founders' desired ownership percentages were too high if the company's pre-money valuation was to be over $10 million. Sagi's testimony that Boger told him that Infinity wanted him to step down as president of the company and give up some stock is irrelevant to Sagi's contract interference cause of action, as Sagi agreed to step down as president and assume the role of vice-president of business development with no change in his percentage of ownership.

2. *Sagi cites Exhibit 329 as evidence that before the Series A preferred stock transaction closed, defendants unsuccessfully attempted to force Sagi to reduce his ownership percentage.*

Exhibit 329 is a pre-investment email from Infinity representative Virginia Turezyn to Sagi. The email appears to respond to a proposal by Sagi that Infinity's ownership be reduced to 18.5 percent to accommodate an employee stock option pool. After expressing the view that the option pool was light in view of the key hires the

company would need, Ms. Turezyn stated: "Interesting that you changed our ownership and not yours – if we consider 18.5 [percent] ownership it will req[uire] an [additional] 5 [percent] from founders to [the option] pool."

Exhibit 329 merely evidences pre-investment negotiations about the extent to which the parties' ownership percentages would be reduced to supply the option pool. The email reflects Infinity's legitimate concerns regarding its contemplated investment and participation in the company; it does not show an outsider's intent to tortiously interfere with Sagi's economic relationship with the company. The reduction of ownership to supply the option pool understandably was a pre-investment negotiation point, and, in essence, the email simply says, "If we are going to give up some of our ownership for the pool, you will have to give up some of yours as well." The email shows Sagi was trying to force Infinity to reduce its ownership percentage as much as it shows Infinity was trying to force a reduction of Sagi's percentage.

3. *Sagi cites Exhibit 333 as evidence that he successfully rejected efforts to reduce his ownership percentage.*

Exhibit 333 is an internal Infinity email noting that a Concord representative had spoken to Sagi and reported that Sagi and Boger were "unwilling to move from their 40% and are willing to walk away." The email shows the VC defendants were willing to accommodate Sagi and Boger by lowering their investments to $3.5 million each and, if the option pool needed to be increased in the future, having ownership percentages "diluted pro rata." Thus, the email is evidence that the VC defendants were yielding to Sagi and *Boger's* demand that their ownership share remain at 40 percent. To the extent

Sagi's case for contract interference is based on the VC defendants' alleged efforts to force him to reduce his ownership percentage, Exhibit 333 provides no evidentiary support. As a matter of common sense, any evidence that Sagi successfully rejected defendants' alleged efforts to reduce his ownership percentage undermines, rather than supports, Sagi's theory that defendants committed actionable interference with his economic relationship with Unwired. Exhibit 333 merely shows arms-length, pre-investment negotiations between a fledgling company's founders and prospective investors; it does not evidence tortious interference by third parties or strangers to the enterprise.

4. *Sagi cites Exhibit 166 as evidence that defendants continued to work behind his back to find a way to abrogate his Founder Stock Purchase Agreement and reduce his holdings.*

Exhibit 166 consists of a chain of emails between Boger and Concord representative Yair Safrai addressing Infinity's unwillingness to invest in Unwired unless Sagi stepped down from his position as president of the company. Safrai stated that Sagi had told him Infinity wanted to change the equity structure between the founders and wanted to remove Sagi from the executive team altogether. Boger outlined a number of planned corporate changes, including moving corporate headquarters to Maryland and making Sagi vice-president in charge of business development. However, Boger insisted there would be no change in the equity structure. Noting Infinity did not think Sagi was "up to the task of being a VP business development" Boger told Safrai: "They are wrong in my opinion based both on my experience with [Sagi] and his track record." Boger

asked Safrai's permission "to tell Infinity that Concord does not have a problem with [Sagi] as VP business development." He stated that he felt the plan he outlined "was a very good solution that will both get Infinity's buy-in as well as keep [Sagi's] significant contribution to the company." Safrai endorsed Boger's plan as an "excellent solution" and told Boger to tell Infinity that he thought Sagi should be the vice-president of business development was sure Sagi would "do an excellent job."

This evidence does not show that Boger and Concord representative Safrai were working behind Sagi's back to find a way to abrogate his Founder Stock Purchase Agreement and reduce his holdings. It shows that Sagi was aware Infinity would not invest in the company if he was president, and that Boger and Safrai were discussing a solution that would keep Sagi on the executive team without losing Infinity's investment. The email exchange does not evidence any effort to *reduce* Sagi's holdings; rather, it shows the opposite, as Boger made it clear there would be no change in the equity structure, and Safrai endorsed his plan. Even if Exhibit 166 could reasonably be viewed as evidencing an intention to reduce Sagi's holdings in the company, nothing in the email exchange suggests that Boger and Safrai did not have the company's best interests at heart in discussing future moves. To the contrary, the main objectives articulated in the exchange were to prevent Infinity from backing out of its much needed investment in the company over its dissatisfaction with Sagi, while keeping Sagi involved in the company's management. Exhibit 166 supports the court's grant of nonsuit on both the ground that there is no evidence of tortious contract interference and the ground that defendants' conduct is privileged under section 769.

5. *Citing Exhibit 357, Sagi asserts: "Defendants had no intention of honoring [Sagi's] contractual and other economic rights, and were planning among themselves 'how to transition the company from where it is right now to where we decided it will be.'"*

Exhibit 357 is an email exchange between Boger and Safrai in which Boger informs Safrai that he had spoken to an Infinity representative "about the changes we had discussed at Unwired," that the Infinity representative "sounded very pleased with the outcome," and that "Infinity now considers the matter closed." Boger added that there was "a small issue" he wanted to discuss with Safrai "regarding how to transition the company from where it is right now to where we decided it will be." In his response, Safrai stated: "Congratulations. I think you did a great job here and the outcome will eventually be very positive to the company."

Nothing in this exchange shows that Boger and Safrai were plotting against Sagi and "had no intention of honoring [Sagi's] contractual and other economic rights." In any event, Boger's reference to the Infinity representative's being "pleased with the outcome" of the changes they were discussing, and Safrai's statement that the "outcome" would "eventually be very positive to the company" show that the actions they were discussing were taken to further the company's best interests, and thus were protected by the section 769 privilege.

6. *Sagi cites Exhibit 1120*[13] *as evidence that the VC defendants enlisted Boger to work together regarding their "concerns with [Sagi]."*

Exhibit 1120 is an email from an Infinity representative to two Concord representatives. The email requests a "conversation, *without [Boger]*, to discuss our significant concerns with [Sagi] and whether or not we can go forward with the financing." (Italics added.) This email is not evidence that the Infinity and Concord enlisted Boger's help regarding concerns about Sagi; it shows the opposite – i.e., that Infinity wanted to discuss it's concerns about Sagi with Concord without Boger being present. It also shows that before Infinity invested in Unwired, it had significant concerns about Sagi's role in the company that were causing it to consider not investing. Nothing in Exhibit 1120 or any other evidence in the record suggests that Infinity's concerns were not legitimate business concerns about the viability and potential for success of the enterprise in which it was about to invest substantial sums of money. The evidence that the VC defendants had concerns about Sagi is insufficient to defeat the section 769 privilege.

7. *As noted above in the discussion of Gray Cary's nonsuit, Sagi claims that the November 2000 shareholder consent documents regarding removal of Sagi from the board of directors were actually prepared by Gray Cary in August 2000 "in preparation*

---

13 There is no reference to Exhibit 1120 in the list of exhibits identified or received in the reporter's transcript master index. Exhibit 1120 bears a sticker stating it was identified on September 4, 2002, but the only volume of the reporter's transcript for that day contains no reference Exhibit 1120. Thus, it appears it was not admitted into evidence.

of what was to come," evidencing a conspiracy on the part of all the defendants to remove Sagi from the board.

Although the court's unchallenged finding (discussed above) that Gray Cary did not prepare the consent forms in August, as Sagi claims, but around the time they were executed in November, 2000, is part of the court's ruling on Gray Cary's motion for judgment, it would be binding as to all defendants if this case were remanded for further proceedings on Sagi's sixth cause of action. Accordingly, Sagi's evidence that Gray Cary prepared the consents in August provides no basis to reverse nonsuit on the sixth cause of action as to any defendant

8. *Without citation to the record, Sagi states that shortly after the Series A transaction closed, defendants caused substantially all of the company's functions to be moved to Maryland. He cites evidence (emails) that he expressed concern about the amount of travel the company's move to Maryland would require of him. He also cites evidence that under his Founder Stock Purchase Agreement with the company, "the imposition of travel requirements substantially more demanding of [him] than such travel requirements existing as of the date of [the] Agreement" constituted "good reason" under the agreement for him to voluntarily terminate his employment with the company, which would prevent the company from exercising its option under the agreement to repurchase his unvested shares of stock.*

Evidence that the company decided to move all of its operations to Maryland and that Sagi was concerned about the move is irrelevant to the issue of whether defendants committed actionable interference with Sagi's contractual relationship with the company.

The fact that under his Founder Stock Purchase Agreement, Sagi's increased travel burden qualified as "good reason" to voluntarily terminate his employment with the company and thereby prevent the company from repurchasing his unvested shares is immaterial, as he did not exercise his right to voluntarily terminate his employment with the company.

9. *Without citation to the record, Sagi states: "At the time of these changes, defendants reacted to [Sagi] as a 'cancer in the body of the company and we [Defendants] will have to take care of it if it doesn't work.'" The "cancer" statement is in Exhibit 209, which apparently was never admitted into evidence.*

Exhibit 209 is an email from Concord representative Safrai to Boger regarding Sagi's concerns about the company's move to Maryland. Safrai wrote: "I agree [with Boger] we should be easy on [Sagi] in the coming few weeks however we all expect him to behave as a founder. The first step should be educational (although I am not sure how successful it will be). If we don't see improvement we will need to think about what are our next steps. As [Infinity representative] Virginia [Turezyn] said, this is cancer in the body of the company and we will have to take care of it, if it doesn't work."[14]

Although it appears Exhibit 209 was not admitted into evidence, Ms. Turezyn admitted in her trial testimony, when asked about Exhibit 209, that she had referred to

---

14 Like Exhibit 1120, there is no reference to Exhibit 209 in the list of exhibits received in the reporter's transcript master index. The reporter's transcript shows it was marked for identification on August 21, 2002 and it bears a clerk's sticker stating it was identified on that date. However, it is not included in the reporter's list of exhibits received.

Sagi as a cancer in the body of the company. She explained: "I think we had discussions post the September board meeting that if we had an individual that was not performing, that I used an analogy of this is like a cancer in the body of the company, and you can't just let it fester, you have to deal with it, and you've got to do whatever you can to remediate and make it better or it's just not going to work for the company."

The reasonable inference from this testimony is that defendants' actions regarding Sagi were motivated by a genuine concern for the company's well being, and thus were protected by the section 769 privilege. The contrary inference – i.e., that the VC defendants were not predominantly acting out of concern for the company in which they had just invested millions of dollars, but rather out of a malicious desire to interfere with Sagi's contractual relationships with the company – is not reasonable.

10. *Sagi cites testimony that after his employment was terminated, defendants pressured him to give up stock he acquired as a founder*.

This is an accurate statement. However, Sagi ultimately did not give up any shares that were vested. The real issue regarding Sagi's stock (discussed below) is whether defendants' characterization of his termination as being for cause was actionable contract interference, as the "for cause" termination gave the company the right to repurchase his unvested shares.

11. *Defendants determined Sagi's termination was for cause after he was terminated*.

The jury found that Sagi's termination was not for cause and awarded Sagi $2.15 million against Unwired for breach of contract. The issue as to the VC defendants and

Boger is whether they can be liable for contract interference based on Unwired's breach of contract. The answer is no, because Infinity and Concord did not terminate Sagi; he was terminated by the board of directors – i.e., by Unwired.[15] To the extent Infinity and Concord participated in the decision to terminate Sagi through their representatives who were members of the board, they (and Boger) are protected from liability for tortious interference with Sagi's employment contract under the section 769 privilege because there is no evidence the board members were not acting to further the interests of the company.

12. *Sagi asserts that defendants "further moved to abrogate [his] rights as a shareholder and under the Founder Stock Purchase Agreement and to continue serving on the Board of Directors by causing him to be unilaterally removed from the Board of Directors and not allowed to attend Board meetings. Defendants did this by an improper vote by written consent of the shareholders they signed."*

As discussed above, the court's finding that Gray Cary prepared the written consents in November, 2000, and not early in August "in preparation of what was to come," negates Sagi's claim that the written consents were improper. The fact that the defendants voted to remove Sagi from the Board is not a basis to impose tort liability on them, as they acted as directors or shareholders of Unwired in recommending or voting

---

15 The court denied Sagi's "Motion To Amend The Judgment to Add Infinity and Concord Defendants to the Jury Verdict." The record contains no *judgment* on the jury verdict in the record, but the title of Sagi's motion indicates a judgment on the verdict was entered. The verdict is also referred to in the judgment addressing Sagi's claims against the VC defendants and Boger and those defendants' cross-complaint.

for Sagi's removal from the Board, and there is no evidence that their actions were not predominantly, if not wholly, motivated by the belief that they were furthering the company's interests.

13. *The share register maintained by Gray Cary shows the tabulation of the votes was "insufficient." "Defendants" refused to provide the details of how they calculated a majority vote because "they knew there had not been a majority of shares voting, and did not want to reveal this to [Sagi]."*

Sagi's remedy, if any, for an improper vote to remove him as a director is against Unwired, and not against the shareholder or director defendants on a contract interference theory. Even if the removal vote was improper and resulted in interference with Sagi's contractual relationships with the company, the interference is privileged because defendants' motive was to protect the company's interests.

14. *"Defendants" caused Unwired to repurchase 2,370,667 of Sagi's common stock at $.01 per share*.

The jury found this was an unauthorized repurchase and awarded Sagi breach of contract damages of $2.15 million. The evidence shows the various non-Gray Cary defendants' participated in this breach of contract in their roles as shareholders or directors of Unwired acting in what they believed was the company's best interests. Thus, defendants are protected from tort liability for the breach under the section 769 privilege.

---

15. *In July 2001, defendants voted by written consent to amend the Articles of Incorporation to reduce the number of common stock directors from two to one, with the common stock director required to be the CEO. Defendants did this to prevent Sagi from voting his shares to re-elect himself, or anyone else, to the board*.

This action falls within the section 769 privilege, as it was taken after Sagi had filed this action on April 16, 2001.*)* By that time, defendants unquestionably were of the view that Sagi's continued involvement in Unwired was not in the company's best interests.

16. *Sagi claims: "To coerce [Sagi] and in furtherance of their efforts to interfere with [his] contractual and economic relationships, [d]efendants threatened to harm [plaintiff], his reputation and his future career*."

Following this assertion is a list of 10 email exhibits that contain statements to or about Sagi, for the most part urging him (at times desperately) or expressing frustration at his refusal to accept some sort of compromise regarding the conflict between him and the company that would prevent the VC defendants from backing out of their financial support, keep the company from going under, and protect his own reputation (presumably among venture capitalists). None of the email messages raises an inference of interference with Sagi's contractual relationship with Unwired that was not motivated by a desire to save the company.

In summary, the fundamental problem with Sagi's interference claim is that the interference torts were designed to remedy interference by outsiders to contractual (or prospective economic) relationships, and all of the defendants in this action were

"insiders" who had a financial interest in the entity with which Sagi had a contractual and economic relationship. Sagi cited no evidence that would defeat the section 769 privilege as to any defendant. On that basis, we affirm nonsuit on the sixth cause of action as to each of the responding defendants.

II. The VC Defendants' Appeal

The VC defendants are appealing the portion of the judgment awarding Sagi nominal damages of one dollar, plus costs, on Sagi's cause of action for breach of fiduciary duty. The court concluded that the VC defendants breached their fiduciary duties to Sagi because the Series B preferred stock transaction was unfair to him as a common stockholder. The VC defendants and Sagi agree that the resolution of this matter is governed by Delaware law because Unwired was incorporated in Delaware.[16] In its statement of decision, the court looked "to Delaware law to determine the legal standard by which to judge the VC's conduct."

Under Delaware law, when a controlling-shareholder defendant is charged with self-dealing in a transaction, the defendant has the burden of establishing the entire fairness of the transaction. (*Weinberger v. UOP, Inc.* (Del. 1983) 457 A.2d 701, 710 (*Weinberger*); *Kahn v. Tremont Corp.* (Del. 1997) 694 A.2d 422, 428.) "The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces

---

16 Under California's "internal affairs" doctrine, the law of the state of incorporation governs a corporation's internal procedures. (*McDermott v. Bear Film Co.* (1963) 219 Cal.App.2d 607, 608-609; *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 442-443.)

questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. [Citations.] However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness." (*Weinberger, supra,* 457 A.2d at p. 711.)

Here, the court concluded: "Concord and Infinity failed to meet their burden of proof to establish either the fair dealing or fair price aspect in the Series B transaction. The VC's did not present competent evidence sufficient to satisfy their burden of proof that the negotiation and consummation of the Series B transaction was with notice, disclosure, and an opportunity for all shareholders to participate, or that the Series B transaction was at a fair price."

For purposes of their appeal, the VC defendants accept the facts set forth in the court's statement of decision regarding the breach of fiduciary duty claim. The VC defendants contend that the court's factual findings establish, as a matter of law, that the Series B transaction was entirely fair to Sagi and the other common shareholders under Delaware law. The VC defendants assert: "Delaware cases applying *Weinberger* have uniformly held that, where a corporation would go out of business absent the challenged

transaction, and the benefits to the corporation provided by the transaction could not be found elsewhere, the transaction is deemed fair."

None of the cases cited by the VC defendants generally hold that a corporate financing or stock transaction must automatically be deemed fair, as a matter of law, if the corporation would go out of business but for the challenged transaction. By its nature, entire-fairness review requires a case-by-case determination. "The standard of entire fairness is . . . not in the nature of a litmus test that 'lend[s] itself to bright line precision or rigid doctrine.' [Citation.] . . . [E]ntire fairness cannot be ascertained by an unstructured or visceral process. [Citation.] Rather, it is a standard by which the [court] must carefully analyze the factual circumstances, apply a disciplined balancing test to its findings, and articulate the bases upon which it decides the ultimate question of entire fairness." (*Cinerama, Inc. v. Technicolor, Inc.* (Del. 1995) 663 A.2d 1156, 1179 (*Cinerama*).)

The VC defendants essentially argue that the only relevant factor in determining the entire fairness of the Series B transaction was the fact that Unwired would have ceased operations absent the transaction. This argument ignores *Weinberger*'s directive that "*[a]ll aspects* of the [fairness] issue must be examined as a whole since the question is one of entire fairness." (*Weinberger, supra,* 457 A.2d at p. 711, italics added.) *Weinberger* made it clear that under the "fair dealing" aspect of entire fairness analysis, a court must consider a number of other factors, including the timing of the transaction, how the transaction was initiated, negotiated and structured, how it was disclosed to the directors, and how approvals of the directors and stockholders were obtained, not to

mention the factors relevant to a "fair price" determination. (*Weinberger, supra,* 457 A.2d at p. 711.)

The cases on which the VC defendants principally rely support the proposition that the impending failure of a corporation is not the *only* relevant factor in determining the entire fairness of a financing transaction that keeps the business afloat. In *Marciano v. Nakash* (Del. 1987) 535 A.2d 400, the Delaware Supreme Court upheld the lower court's finding that loans to a corporation made by defendants who owned 50 percent of the corporation passed the entire fairness test based on evidence that (1) the defendants made the loans with the bona fide intention of helping the corporation to remain in business; (2) the defendants were not depriving the corporation of a business opportunity but were providing it a benefit unavailable elsewhere; *and* (3) the terms of the loans compared favorably to those previously imposed by a bank. (*Id.* at p. 405.)

In *Rosenberg v. Oolie* (Del. Ch., October 16, 1989, No. 11,134) 1989 Del. Ch. Lexis 152) (*Rosenberg*), the trial court, in ruling on the plaintiff shareholders' application for a preliminary injunction, considered whether the plaintiffs probably would succeed on the merits of their claim that certain loan transactions between the defendants and the corporation were not entirely fair. Although the court's determination that plaintiffs probably would not succeed on that claim was largely based on the fact that the corporation would have had to cease operations within days or weeks absent the subject loans, the court also considered whether the terms of the loans were likely to satisfy the entire fairness test. (*Id.* at p. 15.) Further, the court cautioned: "It is not a foregone conclusion that, after the record has been fully developed, these loans will survive

scrutiny." (*Id.* at p. 16.) *Marciano* and *Oolie* illustrate that while the a corporation's impending failure absent a challenged transaction is an important factor to consider in determining whether the transaction is entirely fair, it is not the only relevant factor.

Moreover, the Delaware Supreme Court has held that "when entire fairness is the applicable standard of judicial review, . . . injury or damages becomes a proper focus only *after* a transaction is determined *not* to be entirely fair." (*Emerald Partners v. Berlin* (Del. 2001) 787 A.2d 85, 93 (*Emerald Partners*); citing *Cinerama, supra,* 663 A.2d at p. 1166.) As was proper under *Emerald Partners* and *Cinerama*, the court here considered the entire fairness of the Series B transaction before considering whether the alleged unfairness caused Sagi any injury or damages. In its statement of decision concerning the defendants other than Gray Cary the court stated: "Notice of the Series B transaction was not given to all shareholders in advance of the closing on December 19, 2001. All shareholders were not given the opportunity to provide or secure financing on terms more favorable than the Series B financing as proposed by the [VC defendants]. Full disclosure of the Series B financing was not made to all shareholders, as the common stockholders were not given the same rights as the [VC defendants] to participate in the Series B financings because not all were "accredited investors," and not all met the $10,000 minimum investment threshold established by the [VC defendants]. The Series B transaction, as structured by the [VC defendants], did not allow common stockholders to receive the benefits of the retroactive full ratchet."

Noting that the VC defendants "through control of the Board of Directors, negotiated with [themselves] and then obtained approval for a transaction that would

result in [their] owning 80 % of Unwired Express, with improved liquidation rights and no obligation to pay the full amount of the transaction price if Unwired Express failed to meet predetermined milestones[,]" the court found the Series B transaction was inherently unfair to the minority shareholders.[17] The court further noted that no evaluation of the worth of the company was made and there was no attempt to have existing shareholders share the reduction in ownership on a pro rata basis.

Before turning to the issue of damages, the court concluded: "Recognizing that Unwired Express was faced with no alterative but to acceed [*sic*] to the offer by the [VC defendants], it still does not relieve the [VC defendants] of their fiduciary obligations to the minority shareholders, such as Sagi. Even though the alternative to accepting the [VC defendants]' offer[] was to close the doors of the business, the [VC defendants] are still not permitted to take unfair advantage of the situation, which they did. With Unwired Express in dire straits, the [VC defendants] could name their own price, which they did. The result was that for all intents and purposes they bought the company."

Again, it was proper for the court to determine the entire fairness of the transaction by examining "[a]ll aspects of the issue . . . as a whole" (*Weinberger, supra,* 457 A.2d at p. 711) without regard to whether Sagi suffered damages. In doing so, the court properly considered the company's financial predicament, but did not view it as the dispositive factor. Only after finding the transaction did not satisfy the entire fairness test did the

---

17 For purposes of this appeal only, the VC defendants do not challenge the trial court's finding that collectively, they were controlling shareholders and, as such, had the burden of proving the entire fairness of the Series B transaction.

court turn to the issue of relief. At that point the court could properly fashion *any* form of equitable relief that was appropriate. (*Cinerama, Inc., supra,* 663 A.2d at p. 1166.) The court found nominal damages to be the appropriate relief because Unwired ultimately failed and Sagi's stock in the company became worthless.[18]

The court's handling and resolution of the entire fairness issue was not erroneous under Delaware law. The fact that there were no other financing options available to Unwired and the company would have gone out of business sooner than it did without the Series B financing does not establish that the Series B transaction was entirely fair under *Weinberger*; it simply establishes that to the extent the transaction was unfair to Sagi, the unfairness did not cause him any monetary damages because the company ultimately failed and his stock became worthless. The fact that the company ultimately failed does not establish that Sagi would not have been damaged by the Series B transaction had the company survived and prospered. The court's findings do not establish that the Series B transaction was entirely fair as a matter of law. Accordingly, we will not disturb the judgment against the VC defendants on Sagi's breach of fiduciary duty claim.

---

18 Under Delaware law, quantifiable damage is not a necessary element of a cause of action for breach of fiduciary duty. (See *In re Tri-Star Pictures, Inc., Litigation* (Del. 1993) 634 A.2d 319, 334, fn. omitted, disapproved on another point by *Tooley v. Donaldson, Lufkin & Jenrette, Inc*. (Del. 2004) 845 A.2d 1031, 1035-1039.)

III. Gray Cary's Appeal

Gray Cary appeals the post-judgment order denying its motion for attorney fees to be paid by Sagi under the attorney fees clause in the Investors' Rights Agreement, which provides: "In the event that any action, suit or other proceeding is instituted concerning or arising out of this Agreement or any transaction contemplated hereunder, the prevailing party shall recover all of such party's costs and attorneys' fees incurred in each such action, suit or other proceeding, including any and all appeals or petitions therefrom." Gray Cary moved for attorney fees on the grounds (1) it was the prevailing party in Sagi's action; (2) Sagi's claims against it arose out of and concerned the Investors' Rights Agreement and transactions contemplated thereunder; and (3) its attorney fees were reasonably incurred.

Sagi opposed the motion on the grounds (1) Gray Cary was not a party to the Investors' Rights Agreement because it was signed by GCWF Investment Partners II and not Gray Cary; (2) the Investors' Rights Agreement was superseded by an Amended and Restated Investors' Rights Agreement to which Sagi is not a party; (3) Sagi's claims against Gray Cary did not arise out of or concern the Investors' Rights Agreement; and (4) Gray Cary's attorney fees are grossly excessive.

The court denied Gray Cary's motion for attorney fees on the ground Gray Cary was not a party to the agreement. The court also noted: "Gray Cary has attempted to do a similar 'about face' in its position that it accuses [Sagi] of arguing in its opposition. Throughout this case, Gray Cary has held fast to the position that Gray Cary, LLP was a separate and distinct entity from GCWF Investment Partners, and yet it now brings a

motion for attorney's fees based on what it frames as [Sagi's] allegations and argument, which were ultimately unsuccessful at trial as Gray Cary was, indeed, the prevailing party."

Gray Cary contends that Sagi made judicial admissions that Gray Cary was a party to the Investors' Rights Agreement. As a separate basis for reversal, Gray Cary contends Sagi should be judicially estopped from taking the position that Gray Cary was not a party to the Investors' Rights Agreement. Gray Cary's judicial estoppel argument is meritorious.

"An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the 'determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.' " (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.)

The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from asserting a position in a legal proceeding that is contrary to a position previously taken in that proceeding or an earlier proceeding. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171 (*Jackson*), 181.) The doctrine applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at p. 183, fn. omitted.)

Each of these elements is satisfied here. Sagi clearly took the position throughout the litigation and during trial that Gray Cary was a Series A investor and a party to the Investors' Rights Agreement, and that Gray Cary breached that agreement. Sagi named Gray Cary as a defendant in his first amended complaint, but did not name GCWF Investment Partners II. The first amended complaint contains allegations that Gray Cary is a preferred stockholder of Unwired and acquired 28,571 shares of Unwired's Series A preferred stock of [Unwired]. The first amended complaint further alleges that Gray Cary purchased shares of the Series B preferred stock and its "shares of Series A Preferred Stock were given a retroactive full ratchet." Although the first cause of action for breach of contract and the second cause of action for breach of the implied covenant of good faith and fair dealing are entitled as being against Unwired and count one of both causes of action specifically allege that *Unwired* breached the Founder Stock Purchase Agreement, count two of both causes of action allege that "defendants" breached the terms of an "Amended Certificate" and the Investors' Rights Agreement. By directing the charging allegations of count one against Unwired only and directing the charging allegations of count two against "defendants," Sagi presumably intended to hold *all* of the defendants, including Gray Cary, liable for breach of the Investors' Rights Agreement under count two of the first and second causes of action.

In opposition to Gray Cary's unsuccessful motion for summary judgment, Sagi specifically asserted that Gray Cary purchased Series A preferred stock and was a party to the Investors' Rights Agreement. Sagi also asserted that Gray Cary and the other defendants voted to remove Sagi from Unwired's board of directors, and that

"[d]efendants' vote to remove [Sagi] as a director was in breach of their obligations under ¶ 3.3 of the Investors' Rights Agreement."

At trial, during argument on Gray Cary's motion for nonsuit after Sagi's opening statement, Sagi's counsel asserted that Gray Cary was a party to the Investors' Rights Agreement and that "they clearly breached that contract." When the court asked whether Sagi's counsel had pleaded breach of the Investors' Rights Agreement, counsel replied, "I did." Later, during additional opening statement that the court allowed Sagi to present, Sagi's counsel told the jury: "In addition, [Gray Cary was] a party to the investor rights agreement and at the request, I believe, of some of the other defendants in this case, the evidence will show they did not carry out their obligations under that agreement and instead refused to hold a meeting of shareholders so that Mr. Sagi could put himself back on the board and actively participate[d] with the other defendants in keeping Mr. Sagi ousted from the company and getting back his shares."

During oral argument on Gray Cary's later motions for nonsuit and judgment, Sagi's counsel argued that Unwired's repurchase of Sagi's unvested stock was not "de minimis [to Gray Cary] in the sense that Gray Cary had two different categories. Gray Cary had common stock and Gray Cary had preferred stock. . . . and Gray Cary . . . believed that the stock had gone up in value prior to the closing. ¶ And Gray Cary, by participation, benefited both their preferred stock and their common stock . . . ."

After the court granted Gray Cary's motions for nonsuit and judgment, Sagi filed a request for a statement of decision explaining the factual and legal bases for the rulings in Gray Cary's favor on his causes of action for breach of fiduciary duty and constructive

fraud. In that request, Sagi proposed the court make the following finding: "Gray Cary violated the terms of the Investors Rights Agreement it signed in the unlawful removal of [Sagi] from the Board of Directors and further in the unlawful reduction in the Common Stock Directorships to one[.]" Gray Cary later filed its own proposed statement of decision, and Sagi filed opposition and revisions to Gray Cary's proposed statement in which he asked the court to make the following finding: "The Investor Rights Agreement provided that Gray Cary would vote to keep Sagi on the board of directors. Gray Cary's vote to remove [Sagi] from the Board violated this Agreement and breached its fiduciary duty. Gray Cary's vote to reduce the number of common stock directors from two to one further violated this Agreement and effectively disenfranchised Sagi and the other Common Stockholders other than Boger."

Thus, until Gray Cary moved for attorney fees, Sagi ignored any distinction between Gray Cary (the law firm) and GCWF Investment Partners II (the investment partnership) and took the position that Gray Cary owned 28,571 shares of Series A preferred stock and breached the Investors' Rights Agreement. That position, undisputedly taken in a judicial proceeding, is totally inconsistent with the position he later took in opposition to Gray Cary's motion for attorney fees – i.e., that Gray Cary was not a party to the Investors' Rights Agreement and none of his claims against Gray Cary arose out of or concerned that Agreement.

Until Gray Cary moved for attorney fees, Sagi was successful in asserting the first position. As *Jackson* explained, the "success of the first position " element of judicial estoppel is satisfied when "the tribunal adopted the position or accepted it as true[.]"

(*Jackson, supra,* 60 Cal.App.4th at p. 183.) Before Gray Cary moved for attorney fees, the court adopted Sagi's first position. In its statement of decision regarding Gray Cary, the court decided: "The Investor [*sic*] Rights Agreement did not guarantee Sagi a seat on the board of directors, so *Gray Cary's vote to remove him from the board did not violate the Agreement* or evidence any breach of fiduciary duty. Gray Cary's vote to reduce the number of common stock directors from two to one was done after the Agreement was amended to permit that change, *and therefore did not violate the Agreement* or evidence a breach of fiduciary duty." (Italics added.) By ruling on the merits of Sagi's claim that Gray Cary breached the Investors' Rights Agreement and not rejecting the claim on the ground Gray Cary was not a party to that agreement, the court necessarily adopted Sagi's position that Gray Cary was a Series A stockholder and party to the agreement.[19]

Finally, Nothing in the record suggests that Sagi took the first position as a result of ignorance, fraud and mistake, and Sagi makes no such claim in this appeal. The record indicates Sagi chose to ignore the fact that Gray Cary and GCWF Investment Partners II were distinct entities in an attempt to hold Gray Cary directly liable for breach of the Investors' Rights Agreement. Sagi is judicially estopped from taking his second position

---

19 The court's adoption of Sagi's position that Gray Cary was a Series A stockholder (and thus a party to the Investors' Rights Agreement) is also shown by the court's finding that "Gray, Cary 's 28,571 shares of series "A" preferred stock constituted a 0.3% interest in [Unwired's] outstanding shares of preferred stock."

– i.e., that Gray Cary is a distinct entity from GGWF Investment Partners II and was not a party to the Investors' Rights Agreement.[20]

Even if Sagi were not judicially estopped from taking the position that Gray Cary is not a party to the Investors' Rights Agreement, Gray Cary is entitled to attorney fees under the mutuality of remedy provision of Civil Code 1717 (hereafter section 1717) for successfully defending Sagi's claim that it breached the Investors' Rights Agreement.[21] "[S]ection 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, . . . when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.] . . . To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled

---

20 As noted, the court expressed the view that Gray Cary was attempting to do an "about face" from the position that it was *not* the same entity as GCWF Investment Partnership II. However, whether Gray Cary asserted that position during the litigation is immaterial, as the focus of judicial estoppel analysis is the position taken by the party against whom judicial estoppel is asserted.

21 Section 1717, subdivision (a) provides, in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

to attorney fees under the contract had they prevailed." (*Santisas v. Goodin* (1998) 17 Cal.4th 599 (*Santisas*), 611.) Had Sagi prevailed on his claim that Gray Cary breached the Investors' Rights Agreement, under the agreement's attorney fee provision and section 1717 he would have been entitled, at least, to attorney fees incurred to litigate that contract claim. Accordingly, under section 1717, Gray Cary is at least entitled to recover attorney fees (if any) incurred to defend against that claim.[22]

Sagi contends that the Investors' Rights Agreement was superseded by an "Amended and Restated Investors' Rights Agreement" that he did not enter into. However, as Gray Cary points out, the original Investors' Rights Agreement provided that it could be amended by a majority vote of common stock shares, and any amendment would be binding each investor or holder. The Amended and Restated Investors' Rights Agreement has the same attorney fee clause as the original agreement.

In any event, Sagi pursued his claim that Gray Cary breached the original Investors' Rights Agreement after the Amended and Restated Investors' Rights Agreement became effective.[23] Thus, he asserted his rights as a party to the original agreement notwithstanding the existence of the superseding amended agreement. The execution of the amended agreement is immaterial to the issue of whether any of Sagi's

---

22 Section 1717 applies only to attorney fees incurred to litigate contract claims. (*Santisas, supra,* 17 Cal.4th at p. 615.) The parties' contractual right to attorney fees incurred to litigate non-contract claims derives from Code of Civil Procedure section 1021.

23 The Amended and Restated Investors' Rights Agreement is dated December 19, 2001. Sagi filed his first amended complaint on June 21, 2002.

claims against Gray Cary arose out of or concern the *original* Investors' Rights Agreement or any transactions contemplated under that agreement such that Gray Cary is entitled to attorney fees under the original agreement's attorney fee clause.

In summary, under the attorney fee provision of the Investors' Rights Agreement, Gray Cary is entitled to recover from Sagi the reasonable attorney fees it incurred in litigating any claims by Sagi that arose out or concerned the Investors' Rights Agreement or any transaction contemplated under that agreement. Gray Cary contends that all of Sagi's claims against it either arose out of or concerned the Investors' Rights Agreement or transactions contemplated by the agreement, such as changing the composition of Unwired's board of directors. Sagi contends the Investors' Rights Agreement was irrelevant to his claims against Gray Cary except to the limited extent it reflects Gray Cary' knowledge of certain promises that were made to him.

Once entitlement to attorney fees has been determined, the apportionment of attorney fees between causes of action for which they are recoverable and causes of action for which they are not recoverable is within the trial court's sound discretion. (*Carver v. Chevron U.S.A., Inc*. (2004) 119 Cal.App.4th 498; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.) "Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) We will remand this matter for the court to apportion Gray Cary's attorney fees, if appropriate, between Sagi's claims that are within the scope of the attorney fee provision of the Investors' Rights Agreement and claims that are not

within the scope of that attorney fee provision, and to award Gray Cary the reasonable attorney fees it incurred in litigating those claims for which attorney fees are recoverable.

DISPOSITION

The judgment entitled "Order and Partial Judgment in Favor of [Gray Cary]" is affirmed. The judgment entitled "Orders and Partial Judgment After Jury Verdicts and Trial by Court Re: Claims of Plaintiff Against All Defendants Except Unwired Express and Gray Cary, and Claims of Cross-Complainants Except Unwired Express" is affirmed. The order denying Gray Cary's motion for an award of attorney fees is reversed and the matter is remanded to the trial court for further proceedings to determine the proper apportionment, if any, of attorney fees between Sagi's claims against Gray Cary for which attorney fees are recoverable under the Investors' Rights Agreement and claims for which attorney fees are not recoverable under the Investors' Rights Agreement, and to

award Gray Cary reasonable attorney's fees incurred in the litigation of the former. Gray Cary, Boger, Infinity and Concord are awarded costs on Sagi's appeal. Sagi is awarded costs on Infinity and Concord's appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.